

No. 3085

United States
Circuit Court of Appeals
For the Ninth Circuit.

J. R. THOMPSON, as County Treasurer of Flathead
County, Montana,

Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a
Corporation,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Montana.

FILED

SEP 1 0 1918

F. D. MURRAY, CLERK
CIR. Ct. APP.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys.

S. C. FORD, Attorney General, State of Montana,
Helena Montana,
FRANK WOODY, Asst. Attorney General, State of
Montana, Helena, Montana,
C. N. FOOT, Kalispell, Montana,
T. H. MACDONALD, Kalispell, Montana,
Attorneys for Plaintiff in Error.
GUNN and RASCH, Helena, Montana,
Attorneys for Defendant in Error.

*In the District Court of the United States, for the
District of Montana, Helena Division.*

No. 567.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff,
vs.

J. R. THOMPSON, as County Treasurer of Flat-
head County, Montana,
Defendant.

BE IT REMEMBERED, that on the 11th day of
January, 1917, the Northern Pacific Railway Com-
pany filed its complaint herein, which said com-
plaint is in words and figures following, to wit:

*In the District Court of the United States, for the
District of Montana, Helena Division.*

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff,

vs.

J. R. THOMPSON, as County Treasurer of Flat-
head County, Montana,

Defendant. [1*]

Complaint.

The plaintiff complains of defendant and for a
first cause of action alleges:

I.

That the plaintiff is and has been for several years
a corporation organized and existing under and by
virtue of the laws of the State of Wisconsin.

II.

That the defendant is the duly elected, qualified
and acting treasurer of the county of Flathead,
State of Montana, and a resident and citizen of said
state.

III.

That this plaintiff is the owner of the following
described lands situated in the county of Flathead,
State of Montana, to wit: Southwest quarter of
southwest quarter of section 1, township 21 north
of range 15 west; all of sections 3 and 5 of town-
ship 21 north of range 15 west; all of section 1, town-
ship 21 north of range 17 west, all of section 3,

*Page-number appearing at foot of page of original certified Transcript
of Record.

township 21 north of range 17 west and all of section 5, township 21 north of range 17 west.

IV.

That said lands are situated within forty miles of the railroad line adopted by the Northern Pacific Railroad Company along which line the said company constructed, operated and maintained a railroad from a point on Lake Superior to a point at or near Portland, in the State of Oregon; and said lands were granted to said company by the Act of Congress approved July 2, 1864, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast by the Northern Route."

V.

That the said Northern Pacific Railroad Company was the predecessor of this plaintiff in the ownership of said lands. [2]

VI.

That during the entire year 1914 said lands, and all thereof, were unsurveyed. In the year 1913 and during the months of September and October thereof surveys of said lands and other lands in said townships were made in the field by the United States and on December 14, 1914, the plats of said surveys were approved by the Surveyor-General of the United States for Montana, and on June 17, 1915, said plats were approved by the Commissioner of the General Land Office and on October 12, 1915, duplicates of the said plats so approved were filed in the land office at Kalispell, Montana,

for the district in which said lands are situated.

VII.

That notwithstanding said lands were unsurveyed as aforesaid, the assessor of Flathead County in the year 1916 assessed said lands as the property of this plaintiff for the year 1914 for the purpose of taxation and pursuant to and by virtue of said assessment taxes were levied and imposed against said lands for the said year 1914 to the amount of \$474.89.

VIII.

That this plaintiff made application to the County Board of Equalization of said county, while in session as such board during the year 1916, to cancel said assessment for the reason that said lands were unsurveyed in the year 1914 and not subject to taxation, which application was in writing and verified by oath of the duly authorized agent of this plaintiff. Said application was denied and refused by said board.

IX.

That on the 28th day of November, 1916, this plaintiff paid said taxes to the county treasurer of said county, said payment having been made under protest in writing upon the ground that said lands were unsurveyed lands during the year 1914, and not subject to taxation.

AND FOR A SECOND CAUSE OF ACTION
PLAINTIFF ALLEGES: [3]

I.

That the plaintiff is and has been for several

years a corporation organized and existing under and by virtue of the laws of the State of Wisconsin.

II.

That the defendant is the duly elected, qualified and acting treasurer of the county of Flathead, State of Montana, and a resident and citizen of said state.

III.

That this plaintiff is the owner of the following described lands situated in the county of Flathead, State of Montana, to wit: Southwest quarter of southwest quarter of section 1, township 21 north of range 15 west; all of sections 3 and 5, township 21 north of range 15 west; all of sections 1, 3 and 5, township 21 north of range 17 west; all of sections 1 and 3, township 21 north of range 18 west; all of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and 35, township 22 north of range 17 west; all of sections 1, 3, 5, 9, 11, 13, 15, and 17, township 22 north of range 18 west; east half of section 19, township 22 north of range 18 west; all of sections 21, 23, 25, 27, 29, 33 and 35, township 22 north of range 18 west.

IV.

That said lands are situated within forty miles of the railroad line adopted by the Northern Pacific Railroad Company along which line the said company constructed, operated and maintained a railroad from a point on Lake Superior to a point at or near Portland, in the State of Oregon; and said lands were granted to said company by the Act of Congress approved July 2, 1864, entitled "An Act

granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast by the northern route.”

V.

That the said Northern Pacific Railroad Company was the predecessor of this plaintiff in the ownership of said lands. [4]

VI.

That during the year 1915 said lands, and all thereof, were unsurveyed. In the years 1913 and 1914 surveys of said lands and other lands in said townships were made in the field by the United States and plats of said surveys were approved by the Surveyor-General of the United States for Montana, as follows: Township 21 north, of range 15 west and township 21 north of range 17 west, December 14, 1914; township 21 north of range 18 west, township 22 north of range 17 west and township 22 north of range 18 west, June 12, 1915; and said plats were approved by the Commissioner of the General Land Office as follows: Township 21 north of range 15 west, and township 21 north of range 17 west, June 7, 1915; township 21 north of range 18 west, township 22 north of range 17 west and township 22 north of range 18 west, December 17, 1915; and duplicates of said plats so approved were filed in the land office at Kalispell, Montana, for the district in which said lands are situated, as follows: Township 21 north of range 15 west and township 21 north of range 17 west, October 12, 1915; township 21 north of range

18 west, March 8, 1916, and township 22 north of range 17 west, and township 22 north of range 18 west, March 15, 1916.

VII.

That notwithstanding said lands were unsurveyed as aforesaid, the assessor of Flathead County in the year 1916 assessed said lands as the property of this plaintiff for the year 1915 for the purpose of taxation and pursuant to and by virtue of said assessment taxes were levied and imposed against said lands for the said year 1915 to the amount of \$3,983.85.

VIII.

That this plaintiff made application to the County Board of Equalization of said county, while in session as such board during the year 1916, to cancel said assessment for the reason that said [5] lands were unsurveyed in the year 1915 and not subject to taxation, which application was in writing and verified by oath of the duly authorized agent of this plaintiff. Said application was denied and refused by said board.

IX.

That on the 28th day of November, 1916, this plaintiff paid said taxes to the county treasurer of said county, said payment having been made under protest in writing upon the ground that said lands were unsurveyed lands during the year 1915 and not subject to taxation.

AND FOR A THIRD CAUSE OF ACTION
PLAINTIFF ALLEGES:

I.

That the plaintiff is and has been for several years a corporation organized and existing under and by virtue of the laws of the State of Wisconsin.

II.

That the defendant is the duly elected, qualified and acting treasurer of the county of Flathead, State of Montana, and a resident and citizen of said State.

III.

That this plaintiff is the owner of the following described lands situated in the county of Flathead, State of Montana, to wit: All of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and 35, township 22 north of range 17 west; all of sections 1 and 3, township 21 north of range 18 west; all of sections 1, 3, 5, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 33 and 35, township 22 north of range 18 west.

IV.

That said lands are situated within forty miles of the railroad line adopted by the Northern Pacific Railroad Company along which line the said company constructed, operated and maintained a railroad from a point on Lake Superior to a point at or near Portland, in the State of Oregon; and said lands were granted to said [6] company by the Act of Congress approved July 2, 1864, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior

to Puget Sound on the Pacific Coast by the northern route."

V.

That the said Northern Pacific Railroad Company was the predecessor of this plaintiff in the ownership of said lands.

VI.

That on the first Monday of March, 1916, said lands, and all thereof, were unsurveyed. In the years 1913 and 1914 surveys of said lands and other lands in said townships were made in the field by the United States and plats of said surveys were approved by the Surveyor-General of the United States for Montana, on June 12, 1915, and the same were approved by the Commissioner of the General Land Office on December 17, 1915, and duplicates of said plats so approved were filed in the land office at Kalispell, Montana, for the district in which said lands are situated, as follows: Township 21 north of range 18 west, March 8, 1916; township 22 North of range 17 west and township 22 north of range 18 west, March 15, 1916.

VII.

That notwithstanding said lands were unsurveyed as aforesaid, the assessor of Flathead County in the year 1916 assessed said lands as the property of this plaintiff for the year 1916 for the purpose of taxation and pursuant to and by virtue of said assessment taxes were levied and imposed against said lands for the said year 1916 to the amount of \$3,951.37.

VIII.

That this plaintiff made application to the County Board of Equalization of said county, while in session as such board during the year 1916, to cancel said assessment for the reason that said lands were unsurveyed on the first Monday in March, 1916, and not [7] subject to taxation, which application was in writing and verified by oath of the duly authorized agent of this plaintiff. Said application was denied and refused by said board.

IX.

That on the 28th day of November, 1916, this plaintiff paid said taxes to the county treasurer of said county, said payment having been made under protest in writing upon the ground that said lands were unsurveyed lands during the year 1916 and not subject to taxation.

WHEREFORE, plaintiff demands judgment against said defendant for the sum of \$8,410.11, with interest from the 28th day of November, 1916, and costs of this action.

GUNN & RASCH,
Attorneys for Plaintiff.

State of Montana,

County of Lewis and Clark,—ss.

M. S. Gunn, being duly sworn, deposes and says:

That he is an officer of the above-named plaintiff, to wit, one of its division counsel for the State of Montana; that he has read the foregoing complaint and knows the contents thereof and that the same

is true to the best of his knowledge, information and belief.

M. S. GUNN.

Subscribed and sworn to before me this 10th day of January, 1917.

[N. S.] W. W. PATTERSON,
Notary Public for the State of Montana, Residing
at Helena, Montana.

My commission expires May 6, 1917.

[Endorsed]: Title of Court and Cause. Complaint. Filed January 11th, 1917. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy. [8]

And thereafter, to wit, on the 31st day of January, 1917, a demurrer was duly served and filed herein, which is entered of record as follows, to wit:

In the District Court of the United States, for the District of Montana, Helena Division.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Plaintiff,

vs.

J. R. THOMPSON, as County Treasurer of Flathead
County, Montana,

Defendant.

Demurrer.

I.

Comes now the defendant and demurs to the first cause of action set forth and alleged in the complaint herein on the ground that the same does not

state facts sufficient to constitute a cause of action.

II.

Defendant further demurs to the second cause of action set forth and alleged in the complaint on the ground that the same does not state facts sufficient to constitute a cause of action.

III.

Defendant further demurs to the third cause of action set forth and alleged in the complaint on the ground that the same does not state facts sufficient to constitute a cause of action.

IV.

Defendant demurs to the complaint herein and the whole thereof, on the ground that the same does not state facts sufficient to constitute a cause of action.

C. H. FOOT and

T. H. MacDONALD. [9]

County Attorney for Flathead County, and

C. H. FOOT,

Attorneys for the Defendant.

[Endorsed]: Title of Court and Cause. Demur-
rer. Filed January 31st, 1917. Geo. W. Sproule,
Clerk. By C. R. Garlow, Deputy.

That thereafter said demurrer came on regularly for hearing, and oral argument was made and briefs filed on behalf of the plaintiff and defendant herein, and said demurrer was by the Court taken under advisement, and that thereafter, to wit, on the 27th day of June, 1917, the Court filed herein its opinion in writing, which is in words and figures following, to wit:

United States District Court, Montana.

NORTHERN PACIFIC RAILWAY COMPANY,
vs.

THOMPSON, County Treasurer.

Opinion.

Plaintiff sues to recover taxes paid under protest, alleging the lands taxed are of its land grant, and were unsurveyed at and for the times for which the taxes were laid. Defendant demurs.

It appears that for all the lands the field work for survey was done prior to the annual dates fixing liability in general for taxes for the periods these taxes were levied. In some thereof the Commissioner of the General Land Office had approved the surveys and plats prior to said dates, and in some he had not; but in none were the plats filed in the local land office until after said dates.

It is conceded the lands are taxable when surveyed and not before. Plaintiff contends lands are not surveyed until the survey plats approved by

the Commissioner are filed in the local land office, citing: [10]

U. S. v. Curtner, 38 Fed. 1;
Lumber Co. v. Shoshone Co., 155 Fed. 613;
Sawyer v. Gray, 205 Fed. 160;
U. S. v. Morrison, 240 U. S. 192.

Defendant contends that lands are surveyed so far as taxation is concerned, when the field work is done, citing Wells County v. McHenry et al. (N. Dak.), 74 N. W. 241.

The Court decides that lands are surveyed when the Commissioner approves the survey and plats.

Both parties cite act July 10, 1886 (24 Stat. L. 143), which provides that grant lands shall not be exempt from taxation "on account of the lien of the United States" thereon for costs of survey, "but this provision shall not apply to lands unsurveyed."

It seems the only effect of this statute is to open to taxation surveyed grant lands though subject to said lien. The words withholding application of the statute to unsurveyed lands are unnecessary, superfluous and excessive legislative caution, in that unsurveyed lands are not exempt from taxation because of said lien, but because not carved out of lands of the United States, because they are not defined, made certain, and identified, because as they are indistinguishable from lands of the United States, taxes ostensibly upon them might actually be upon lands of the United States, always untaxable, and cause embarrassment to the possession and title of the United States and to its disposition

of its lands, which no State administration has power to do. The reasons why unsurveyed grant lands are untaxable are the same now as before the statute and depend not at all upon the statute.

The law requires the commissioner to survey the public lands. He supervises all surveys and none are complete until he approves. Though the field work be done and plats made, all are but intermediate steps by his instruments, going for nothing [11] unless he approves.

There is no survey until officially approved by him, and when he approves, the survey thereby is made and officially complete. His approval is judicial and a public record in the General Land Office. Thereafter, filing the plats in the local land office is ministerial, no part of the survey, and but to make the plats locally accessible for record of rights to and entries of the lands. True, until plats are so filed, the Commissioner can revoke his approval. But so can he after the plats are filed; and this latent power no more detracts from the effect of his approval accomplishing an officially completed survey, than does the power of a Court over its decrees during term, from their finality.

When he approves the survey and plats and not before, the lands lose the status of unsurveyed, are survey, carved out, identified, and capable of reduction to the grantee's use, and doubtless the grantee then could first pay off the lien and secure patents.

There are expressions in cases cited by plaintiff, and in others, tending to support its contention. But they are unnecessary to the decisions or are in

relation to priority of rights that can be initiated or asserted only after plats are filed. *U. S. v. Morrison*, *supra*, contains much recognizing surveys officially complete when approved by the Commissioner. It is believed that the doctrine of relation relied on in *Wells County v. McHenry et al.*, *supra*, has no application. It is the law of taxation that to be taxable, lands must be of taxable status at and for the time taxes are laid. A change in status from untaxable to taxable, occurring subsequent to said time, will not relate back so as to subject them to taxation at and for the said earlier time, but only opens the lands to taxes thereafter accruing.

Demurrer overruled as to counts one and two, and sustained as to count three. [12]

BOURQUIN, J.

[Endorsed]: Memo. On Demurrer. Filed June 27, 1917. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy.

Thereafter, on June 28, 1917, order on Demurrer was made as follows:

In the District Court of the United States, for the District of Montana (Helena Division).

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Plaintiff,

vs.

J. R. THOMPSON, as County Treasurer of Flathead County, Montana,

Defendant.

Order Overruling Demurrer to Complaint, etc.

Herein, Court this day ordered that the demurrer to the complaint be overruled as to counts one and two and sustained as to count three, in accordance with memoranda decision filed.

Entered in open court June 28, 1917.

GEO. W. SPROULE,
Clerk.

And thereafter, to wit, on July 17, 1917, said defendant duly served and filed herein its answer to said complaint, which answer is in words and figures following, to wit:

*In the District Court of the United States, for the
District of Montana, Helena Division.*

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Plaintiff,

vs.

J. R. THOMPSON, as County Treasurer of Flathead
County, Montana,

Defendant.

Answer.

Comes now the defendant and for answer to the complaint herein, admits as follows, to wit:

FIRST. Admits each and every allegation, matter and thing in plaintiff's first cause of action alleged.

SECOND. Admits each and every allegation,

matter and thing [13] in plaintiff's second cause of action alleged.

THIRD. Admits each and every allegation, matter and thing in plaintiff's third cause of action alleged.

WHEREFORE, defendant having fully answered, prays judgment against the plaintiff that he go hence with his costs and that plaintiff take nothing by this action.

T. H. MacDONALD
County Attorney for Flathead County,
Attorney for Defendant.

State of Montana,
County of Flathead,—ss.

T. H. MacDonald, being first duly sworn, deposes and says: That he is the duly and regularly elected, qualified and acting County Attorney of Flathead County, State of Montana; that he makes this verification as such county attorney; that he has read the foregoing Answer and knows the contents thereof and that the same is true according to his best knowledge, information and belief.

T. H. MacDONALD.

Subscribed and sworn to before me this sixteenth day of July, in the year one thousand nine hundred and seventeen.

[N. S.] C. H. FOOT,
Notary Public for the State of Montana, Residing at
Kalispell, Montana.

My commission expires Aug. 21st, 1918.

[Endorsed]: Title of Court and Cause. Answer.
Filed July 17, 1917. Geo. W. Sproule, Clerk.

And thereafter, to wit, on October 5, 1917, the plaintiff served and filed herein its motion for judgment on the pleadings, which said motion is in words and figures following, to wit:

*In the District Court of the United States, for the
District of Montana, Helena Division.*

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Plaintiff, [14]

vs.

J. R. THOMPSON, as County Treasurer of Flathead
County, Montana,

Defendant.

Motion for Judgment on the Pleadings.

I.

Now comes the plaintiff above named and moves the Court for judgment on the pleadings as to the first cause of action contained in plaintiff's complaint on file herein upon the ground that all the allegations in said cause of action are admitted in the answer on file herein.

II.

Moves the Court for judgment on the pleadings as to the second cause of action contained in plaintiff's complaint on file herein upon the ground that all the allegations in said cause of action are admitted in the answer on file herein.

III.

Moves the Court for judgment on the pleadings as to the third cause of action contained in plaintiff's complaint on file herein upon the ground that all the allegations in said cause of action are admitted in the answer on file herein.

This motion will be based upon the complaint and answer on file herein.

GUNN, RASCH & HALL,
Attorneys for Plaintiff.

[Endorsed]: Motion. Filed Oct. 5th, 1917. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 5th day of October, 1917, there was filed herein a stipulation for the submission of said motion to the Court for decision, which said stipulation is in words and figures as follows:

In the District Court of the United States, for the District of Montana, Helena Division. [15]

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Plaintiff,

vs.

J. R. THOMPSON, as County Treasurer of Flathead County, Montana,

Defendant.

**Stipulation Re Submission of Motion of Plaintiff
for Judgment on Pleadings, etc.**

It is hereby stipulated and agreed that the motion of the plaintiff on file herein for judgment on the pleadings may be submitted on the arguments made and briefs submitted by the parties hereto at the hearing of the demurrer to plaintiff's complaint.

Dated this 29th day of September, 1917.

GUNN, RASCH & HALL,
Attorneys for Plaintiff.
T. H. MacDONALD,
Attorney for Defendant.

[Endorsed]: Stipulation. Filed Oct. 5th, 1917.
Geo. W. Sproule, Clerk.

That thereafter, pursuant to said stipulation, said motion was submitted to the Court and thereafter, to wit, on the 5th day of October, 1917, the Court wrote its opinion on the bottom of said motion, which opinion is in words and figures following, to wit:

Opinion on Motion for Judgment on Pleadings.

For reasons, decision of June 27, 1917, motion granted in respect to counts one and two, and denied count three.

October 5, 1917.

BOURQUIN, J.

And thereafter, to wit, on October 9, 1917, judgment was duly rendered and entered herein in words and figures following, to wit: [16]

In the District Court of the United States, for the District of Montana (Helena Division).

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Plaintiff,

vs.

J. R. THOMPSON, as County Treasurer of Flathead County, Montana,

Defendant.

Judgment.

The above-entitled cause having come on regularly for hearing on the motion of plaintiff for judgment on the pleadings as to each cause of action stated in the complaint, and said cause having been submitted for final decision and judgment on said motion and the Court having on the 5th day of October, 1917, rendered its judgment granting said motion as to the first and second causes of action and denying said motion as to the third cause of action, it is now ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover of and from the defendant on the first and second causes of action set out in said complaint, the sum of \$4,767.83, with interest thereon at the rate of eight per cent per annum from the date hereof until paid, together with plaintiff's costs and disbursements in-

curred in this action taxed in the sum of \$28.60, and it is further ORDERED, ADJUDGED AND DECREED that the said complaint be and the same is hereby dismissed as to the third cause of action.

Entered October 9th, 1917.

GEO. W. SPROULE,
Clerk.

[Endorsed]: Judgment. Filed Oct. 9th, 1917.
Geo. W. Sproule, Clerk. [17]

And thereafter, on December 17th, 1917, a petition for writ of error was duly filed herein, which is in the words and figures following, to wit:

*In the District Court of the United States for the
District of Montana.*

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Plaintiff,

vs.

J. R. THOMPSON, as County Treasurer of Flathead County, Montana,

Defendant.

Petition for Writ of Error and Supersedeas.

J. R. Thompson, as county treasurer of Flathead County, Montana, the defendant in the above-named cause, feeling himself aggrieved by the judgment entered herein on the 9th day of October, 1917, in favor of said plaintiff and against said defendant, for the sum of \$4,767.83 on the first and second causes of action in the complaint on file herein, and

for interest from the date thereof at 8% per annum, and for the sum of \$28.60 as plaintiff's costs and disbursements.

Comes now C. H. Foot, T. H. MacDonald, and S. C. Ford, Attorney General, and Frank Woody, Assistant Attorney General of the State of Montana, his attorneys, and petitions the above-entitled court for an order allowing said defendant to prosecute a writ or error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made that all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

C. H. FOOT,
T. H. MacDONALD, [18]
S. C. FORD,

Attorney General of the State of Montana.

FRANK WOODY,

Assistant Attorney General of the State of Montana.

Allowed this 17th day of December, 1917.

BOURQUIN,
Judge.

[Endorsed]: Petition for Writ of Error and Supersedeas. Filed December 17th, 1917. C. R. Garlow, Clerk.

And thereafter, on December 17th, 1917, defendant filed his assignment of errors herein which is in the words and figures following, to wit:

In the District Court of the United States for the District of Montana.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Plaintiff,

vs.

J. R. THOMPSON, as County Treasurer of Flathead County, Montana,

Defendant.

Assignment of Errors.

Comes *not* the defendant, J. R. Thompson, as county treasurer of Flathead County, Montana, plaintiff in error, and files the following assignment of errors upon which he will rely upon his prosecution of the writ of error in the above-entitled cause:

I.

That the United States District Court for the District of Montana, Ninth Circuit, erred in overruling the demurrer of the defendant to the first cause of action stated in the complaint of the plaintiff and defendant in error herein for the reason that said cause of action does not state facts sufficient to constitute a cause of action. [19]

II.

That the said Court erred in overruling the de-

murrer of the defendant to the second cause of action stated in the complaint of the plaintiff and defendant in error herein for the reason that said cause of action does not state facts sufficient to constitute a cause of action.

III.

That the said Court erred in sustaining the motion of the plaintiff and defendant in error herein for judgment on the pleadings as to the first cause of action stated in the complaint on file herein for the reason that said cause of action does not state facts sufficient to constitute a cause of action.

IV.

That the said Court erred in sustaining the motion of the plaintiff and defendant in error herein for judgment on the pleadings as to the second cause of action stated in the complaint on file herein for the reason that the said cause of action does not state facts sufficient to constitute a cause of action.

WHEREFORE, the said J. R. Thompson, as treasurer of Flathead County, Montana, defendant and plaintiff in error, prays that the judgment of the District Court of the United States for the District of Montana, entered herein on the 9th day of October, 1917, in favor of said plaintiff and against said defendant, for the sum of \$4,767.83, on the first and second causes of action in the complaint herein, and for interest from the date thereof at 8% per annum, and for the sum of \$28.60 as plaintiff's costs and disbursements, be reversed and that the said District Court be directed to deny said motion of the plaintiff and defendant in error herein, for

judgment on the pleadings as to said first and second [20] causes of action.

C. H. FOOT,
T. H. MacDONALD,
S. C. FORD,

Attorney General of the State of Montana,
FRANK WOODY,

Assistant Attorney General of the State of Montana.
Attorneys for Defendant and Plaintiff in Error.

[Endorsed]: Assignment of Errors. Filed December 17th, 1917. C. R. Garlow, Clerk.

And thereafter, on December 17th, 1917, a writ of error was duly issued herein, which is hereto annexed and is in the words and figures following, to wit: [21]

Writ of Error.

UNITED STATES OF AMERICA,—ss.
THE PRESIDENT OF THE UNITED STATES,
to the Honorable, the Judge of the District
Court of the United States for the District of
Montana, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in said District Court, before you, between Northern Pacific Railway Company, plaintiff and R. J. Thompson, as county treasurer of Flathead County, Montana, defendant, a manifest error hath happened, to the great damage of the said J. R. Thompson, as county treasurer of Flathead County, Mon-

tana, plaintiff in error, as is said and appears by the petition herein;

We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if the judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, on the 10th day of January next, in the said Circuit Court of Appeals, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct these errors what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, the 17 day of December, 1917, the one hundred and forty-second year of the Independence of the United States of America.

[Seal]

C. R. GARLOW,

Clerk of the United States District Court for the District of Montana, Ninth Circuit. [22]

Service of the within and foregoing Writ of Error and receipt of a copy thereof is hereby admitted this 21st day of December, 1917.

GUNN & RASCH,
Attorneys for Defendant in Error.

Answer of Court to Writ of Error.

The Answer of the Honorable, the Judge of the District Court of the United States for the District of Montana, to the foregoing writ:

The record and proceedings whereof mention is made, with all things touching the same, I certify under the seal of the said District Court, to the Honorable Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the Court.

[Seal] C. R. GARLOW,
Clerk of the District Court of the United States,
District of Montana. [23]

[Endorsed]: #567. Northern Pacific Railway Company, a Corporation, Plaintiff and Defendant in Error, vs. J. R. Thompson, as County Treasurer of Flathead County, Montana, Defendant and Plaintiff in Error. Writ of Error. Filed Jan. 4, 1918. C. R. Garlow, Clerk. [24]

That, on December 17th, 1917, a citation was duly issued herein, which is hereto attached and is in the words and figures following, to wit: [25]

Citation on Writ of Error.

UNITED STATES OF AMERICA,—ss.
To Northern Pacific Railway Company and to Gunn,
Rasch & Hall, Its Attorneys:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Ap-

peals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 10th day of January, 1918, pursuant to a writ of error on file in the clerk's office of the District Court of the United States, of the Ninth Judicial Circuit, in and for the District of Montana, in that certain action No. 567, wherein J. R. Thompson, as county treasurer of Flathead County, Montana, is plaintiff in error, and the Northern Pacific Railway Company, a corporation, is defendant in error, to show cause, if any there be, why the judgment given, made and rendered against the said J. R. Thompson, as county treasurer of Flathead County, Montana, in the said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States of America, this 17 day of December, 1917, and of the Independence of the United States the one hundred and forty-second.

BOURQUIN,
United States District Judge, District of Montana.

Service of the within and foregoing citation is hereby acknowledged this 21st day of December, 1917.

GUNN & RASCH,
Attorneys for Defendant in Error. [26]

[Endorsed]: #567. Northern Pacific Railway Company, a Corporation, Plaintiff and Defendant in Error, vs. J. R. Thompson as County Treasurer of

Flathead County, Montana, Defendant and Plaintiff in Error. Citation. Filed Jan. 4, 1918. C. R. Garlow, Clerk. [27]

And thereafter on December 17th, 1917, a stipulation waiving supersedeas and cost bond was filed herein, which is in the words and figures following, to wit:

In the District Court of the United States for the District of Montana.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Plaintiff,

vs.

J. R. THOMPSON, as County Treasurer of Flathead County, Montana,

Defendant.

Stipulation Re Allowance of Writ of Error, etc.

It is hereby stipulated and agreed by and between the above-named parties, plaintiff and defendant, that the petition of the above-named defendant for a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit may be allowed and that all further proceedings in the above-entitled court may be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals without said defendant being ordered or required to file a supersedeas bond.

And it is further stipulated and agreed by and

between said parties, plaintiff and defendant, that the said defendant shall not be required to file a cost bond, but that the filing of such cost bond is expressly waived.

S. C. FORD,
Attorney General of the State of Montana, Attorney
for Defendant.

GUNN & RASCH,
Attorneys for Plaintiff.

[Endorsed]: Stipulation. Filed December 17th,
1917. C. R. Garlow, Clerk.

Thereafter, on Jan. 4, 1918, praecipe for transcript
was filed herein, as follows:

*In the District Court of the United States for the
District of Montana.*

NORTHERN PACIFIC RAILWAY COMPANY, a
Corporation,

Plaintiff and Defendant in Error,
vs. [28]

J. R. THOMPSON, as County Treasurer of Flathead
County, Montana,
Defendant and Plaintiff in Error.

Praecipe for Transcript of Record.

To Gunn and Rasch, Attorneys for the Above-named
Plaintiff and Defendant in Error, and C. R.
Garlow, Clerk of Said Court:

You, and each of you, will please take notice that
the undersigned, the attorneys for the defendant and

plaintiff in error above named, hereby serve upon you, and each of you, this praecipe in conformity with the rules of court, to indicate to you the portions of the records and files in the above-entitled cause which said defendant and plaintiff in error desires to and will incorporate in its transcript of record on writ of error herein, to wit, the writ of error issued herein on the 17th day of December, 1917, to have the judgment before rendered and entered herein reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, and the clerk of said District Court will incorporate and include in said transcript the following:

1. Complaint, demurrer thereto, decision of Court on said demurrer, order overruling demurrer as to first two causes of action and sustaining it as to third cause of action, answer, motion for judgment on pleadings, stipulation that said motion may be submitted on the arguments made and briefs filed at the time of the argument of the demurrer to complaint, decision of court on said motion, and judgment.
2. Petition for writ of error and order allowing same.
3. Assignment of errors filed with petition for writ of error.
4. Writ of error and acknowledgment of service by plaintiff.
5. Citation on writ of error and acknowledgment of service by defendant. [29]
6. Stipulation waiving bonds.

7. Copy of this praecipe.

S. C. FORD,

Attorney General of the State of Montana.

FRANK WOODY,

Assistant Attorney General of the State of Montana.

C. H. FOOT,

T. H. MacDONALD,

Attorneys for Defendant and Plaintiff in Error.

Service of the within and foregoing praecipe and receipt of copy thereof admitted and acknowledged this 22d day of December, 1917.

GUNN & RASCH,

Attorneys for Plaintiff and Defendant in Error.

[Endorsed]: Praecipe for Transcript of Record.
Filed Jan. 4, 1918. C. R. Garlow, Clerk. [30]

Thereafter, on Jan. 4, 1918, Order extending time for filing record on appeal herein was duly made, as follows:

*In the District Court of the United States for the
District of Montana.*

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Plaintiff,

vs.

J. R. THOMPSON, as Treasurer of Flathead
County, Montana,

Defendant.

Order Extending Time to and Including January 25, 1918, to File Record and Docket Cause in Appellate Court.

For good cause appearing, it is ordered that the time within which the record on appeal herein is to be filed in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby extended to and including the 25th day of January, 1918.

Dated Jan. 4th, 1918.

GEO. M. BOURQUIN,
Judge. [31]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Montana,—ss.

I, C. R. Garlow, clerk of the United States District Court of the District of Montana, do hereby certify and return to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing consisting of 31 pages, numbered consecutively from 1 to 31, both numbers inclusive, is a true and correct transcript of all pleadings, decisions, judgment, and of all proceedings in said cause required to be incorporated in the record on writ of error by the praecipe of the defendant and plaintiff in error for said record, and consists of full, true, correct and complete copies of the complaint, demurrer to complaint, decision on said demurrer, answer, motion for judgment on the pleadings, stipula-

tion for submission of said motion on the arguments made and briefs submitted [32] on the hearing of said demurrer, decision on said motion, judgment, petition for writ of error and order allowing same, assignment of errors, stipulation waiving supersedeas and cost bonds, praecipe for record, order extending time to file record, and of the whole thereof, as the same appears from the original records and files of said court in my possession as such clerk; and I do further certify and return that I have annexed to said transcript and included within the paging thereof, the original writ of error and citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of fifteen and 45/100 (\$15.45) dollars, and have been made a charge against defendant and plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court at Helena, Montana, this 11th day of January, 1918.

[Seal]

C. R. GARLOW,

Clerk. [33]

[Endorsed]: No. 3085. United States Circuit Court of Appeals for the Ninth Circuit. J. R. Thompson, as County Treasurer of Flathead County, Montana, Plaintiff in Error, vs. Northern Pacific Railway Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error

to the United States District Court of the District of Montana.

Filed January, 14, 1918.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

*In the District Court of the United States for the
District of Montana.*

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Plaintiff,

vs.

J. R. THOMPSON, as Treasurer of Flathead
County, Montana,

Defendant.

**Order Extending Time to and Including January 25,
1918, to File Record on Appeal.**

For good cause appearing, it is ordered that the time within which the record on appeal herein is to be filed in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby extended to and including the 25th day of January, 1918.

Dated Jan. 4th, 1918.

BOURQUIN,
Judge.

[Endorsed]: No. 3085. United States Circuit Court of Appeals for the Ninth Circuit. J. R. Thompson, Treasurer, Plaintiff in Error, vs. Northern Pacific Ry. Co., Defendant in Error. Order Extending Time to File Record to January 25, 1918. Filed Jan. 8, 1918. F. D. Monckton, Clerk. Re-filed Jan. 14, 1918. F. D. Monckton, Clerk.